

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

JEREMIAH SAUNDERS,

Defendant-Appellant.

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UNPUBLISHED

June 27, 2000

No. 212567

Wayne Circuit Court

Criminal Division

LC No. 97-007567

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant, who was charged with four counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felonious driving, MCL 752.191; MSA 28.661, was convicted by a jury of four counts of the lesser offense of felonious assault, MCL 750.82; MSA 28.277, and felonious driving. Defendant was tried jointly with codefendant Daymon Portillo, who was also convicted of four counts of felonious assault and felonious driving. Defendant was sentenced to two years' probation, with the first four months to be served on a tether. He appeals as of right. We affirm.

Defendant argues that he was denied the effective assistance of counsel as a result of counsel's joint representation of himself and codefendant Portillo. Because defendant did not request an evidentiary hearing on this issue in the trial court, our review is limited to the existing record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

To establish that he was denied the effective assistance of counsel as a result of counsel's joint representation, defendant must show that an actual conflict of interest affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). Defendant claims that he was unable to pursue certain defense strategies because his attorney represented both defendants. While defendant was not in a position to implicate codefendant Portillo because of the joint representation, the record indicates that the court was cognizant of the potential availability of this strategy before trial, that it inquired of defense counsel and both defendants in accordance with MCR 6.005(F), and was assured that neither defendant intended to implicate the other. The defense strategy that was actually employed did not create an actual conflict of interest and, in fact, was successful in reducing the extent of each

defendant's criminal responsibility. Thus, defendant was not deprived of the effective assistance of counsel as a result of a conflict of interest.

Defendant also argues that certain statements made by codefendant Portillo at a restaurant shortly after the charged offense were improperly admitted against himself. Because defendant did not object to the statements at trial, appellate relief is not warranted unless defendant shows that plain error (i.e., clear or obvious error) affected his substantial rights, i.e., affected the outcome of trial. Further, even if these two showings are made, this Court should not reverse unless defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

In *People v Poole*, 444 Mich 151, 159-162; 506 NW2d 505 (1993), the Court recognized that, in appropriate circumstances, a codefendant's statement against penal interest, admissible against that codefendant under MRE 804(b)(3), may also be admissible against the non-declarant defendant as substantive evidence. The Court stated:

We conclude, however, that where, as here, the declarant's inculcation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement--including portions that inculcate another--is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [*Id.* at 161.]

Here, the statements by codefendant Portillo were clearly against his penal interest and were made within an hour of the charged incident. Also, defendant was present at the time the statements were made. Moreover, the statements were made as part of a narrative conversation with friends concerning the collision. The statements were not made under circumstances, such as while in custody, suggesting that codefendant Portillo had reason to curry favor with authorities or implicate defendant. *Poole*, *supra* at 162. Considering the totality of the circumstances, we believe that codefendant Portillo's statements were admissible against defendant. Thus, defendant has not demonstrated plain error arising from the admission of the statements. *Carines*, *supra*. Further, we reject defendant's claim that defense counsel was ineffective for failing to object to the admission of codefendant Portillo's statements as against defendant.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald